No. 3772

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. B. CASSERLY,
Plaintiff in Error,

vs.

REY B. WHEELER,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN REPLY

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The plaintiff in error presents the following reply to the points made in the brief of the defendant in error filed in this case. We desire to confine ourselves strictly to a reply, and thus will give attention to certain points made in the brief of defendant in error. These points may be grouped as follows:

(a) Question is made as to the statement of facts of plaintiff in error.

(b) It is claimed that the exceptions taken by the defendant at the trial was insufficient to raise the points discussed by him.

(c) It is claimed that neither the provisions of the "Selective Service Act" nor the regulations issued thereunder are applicable, and that the case is to be governed by ordinary law of the United States and of the State of California.

(d) The law of false imprisonment is discussed and several cases are cited illustrative of the principles of such law.

I.

AS TO STATEMENT OF FACTS.

We submit that the statement of facts set forth by the plaintiff was not defective; counsel seems to fail to appreciate that the case being in effect disposed of by an instruction as to the whole case, the defendant was entitled to have any testimony making in his favor taken as true, and any reasonable inference therefrom in his favor to be drawn. Emphasis was not laid upon the proposition that the plaintiff was not guilty of any crime; no dispute was made as to that, in fact the complaint did not even set forth such fact. The action of false imprisonment does not depend upon guilt or not and the theory of plaintiff's action was that there was no reasonable ground to justify his arrest. Thus his case depended upon want of probable cause for his

arrest rather than his freedom in fact from guilt. The statement of plaintiff in error clearly showed that there was no pretense of an arrest upon a warrant and also expressly conceded that it was found that an error had been made in apprehending the plaintiff.

As to the facts brought to the attention of the defendant before he restrained the plaintiff, the jury were entitled to find from the testimony of Mr. Dolly (Tr. p. 65) that he communicated to the defendant the circumstances. It may be true that the defendant then took the statement of the agent of the Department of Justice as being true and his communications as being well founded, without further investigation, but this, as we will show, was not an improper action.

It is also true that the plaintiff claimed he was prevented from communication with friends. For the purpose of this case, however, the defendant is not bound by such statement and need not have considered it as relevant to the discussion, for certain witnesses on behalf of the defendant, for example, William L. Curtin (Tr. p. 80), Charles A. Baum (Tr. p. 82), and Bertha J. Baum (Tr. pp. 84, 85), showed that the plaintiff requested and was given permission and did in fact telephone to friends.

We submit that the statement of plaintiff in error was fair.

II.

AS TO SUFFICIENCY OF EXCEPTIONS.

At the trial, the defendant saved exceptions to all of the instructions of the court except the first and also as to the refusal of the court to give a certain numbered instruction proposed by him. At the time such exception was taken, the court indicated its assent thereto without further question (Tr. p. 97).

It is apparent that there was a direct issue between the court and the defendant as to the single definite question, to wit, that the undisputed facts of the case required a verdict for plaintiff as to some amount. The holding was not inadvertent but was deliberate and well considered on the part of the court. The instruction so given to find for the plaintiff for some amount was single, on a single definite proposition. The various statements of the court in delivering the instruction were simply reasons therefor. The single proposition stands out, and the court could not have misconceived the statement of the defendant in assigning an exception to the ruling. In such case the authorities are that the exception is sufficient to require the matter to be reviewed. Thus in the case of

Pritchett v. Sullivan, 182 Fed. 480, 484,

it was held that when an instruction states a specific proposition of law on a particular subject obviously *with deliberation* and *not inadvertently,* a general

exception to the charge on that subject is sufficient to challenge the correctness of such a proposition. Further note was taken in the opinion in that case of a colloquy between the court and counsel, at the time of excepting, as being important, the statement being "that the inquiry made of counsel did not call for his view of the law further than already indicated nor an explanation of the reasons for his exception." Here the statement of the court must be taken as an assent to the form of the exception and as indicating that the court well understood what was excepted to, but that the holding being deliberate and not inadvertent, a further exception was not necessary.

In the case of

Felton v. Newport, 92 Fed. 470, 474,

in an opinion concurred in by the present Chief Justice, it was held that the particular exception under review was sufficient in that the charge on the subject was entire and bound up in a single proposition and that if the instruction was erroneous in any substantial particular, it would seem that the exception would reach the error, especially where it pervades the whole instruction given upon the subject to which the exception relates.

A similar holding was made in the case of

Edgington v. U. S., 164 U. S. 361, 364; 41 L. ed. 467, 471,

wherein it was held significant that the paragraph of the charge excepted to did not contain instruc-

tions on separate and distinct propositions, some of which were sound and others not so, the subject treated of being the single one of the proper effect to be given by the jury to evidence of defendant's good character, and that a fair understanding of the instruction could not be reached without reading and weighing the entire paragraph. It was pertinently said that there would have been more room for just criticism had the defendant taken exceptions to sentences or phrases detached from their connection. So here, the single proposition was as to the propriety of instructing for a verdict. It would have been objectionable had the defendant segregated and excepted to the various reasons or illustrations given by the court in giving the single instruction for a verdict.

We may cite also the case of

Bernhart v. City and S. Ry. Co., 263 Fed. 1009, 1016.

We submit that the exception to the court's general instruction, especially when assented to by the court at the time, must be deemed sufficient.

III.

AS TO LAW OF FALSE IMPRISONMENT.

A number of cases are cited in the brief of defendant in error which merely state the law of false imprisonment and declare doctrines which nobody disputes. It is freely conceded that one arrested for crime without warrant, or in cases where a warrant

may be dispensed with, who is arrested without reasonable grounds, is entitled to recover damages from one who effects the arrest; but these cases throw no light upon the arrest in the case at bar. The facts of the cases cited showed ordinary arrests in time of peace. Not a single case cited,—except *Ex parte Jones,* presently to be referred to, and which was on habeas corpus and not for false imprisonment,—involved an arrest made during the late war or involved the consideration of or the construction of the Selective Service Act. In a word, the cases so cited did not turn upon the real point in the case at bar. This brings us to a consideration of the remaining point discussed by defendant in error which presents the real point in controversy in this case.

IV.

THE SELECTIVE SERVICE ACT AND REGULATIONS ISSUED THEREUNDER GOVERN THE CASE AT BAR.

In our opening brief we showed that the arrest of the plaintiff complained of occurred during the late war, and that all the parties concerned had some relation to the administration of the Draft Act; the defendant was a member of the local draft board, performing duties of an important and onerous character in connection with that act; the plaintiff was of an age which rendered him eligible to the draft and had claimed that he had in fact registered; the Bureau of Investigation and the local agents thereof

were some of the agencies expressly made use of by the President in the administration of the Act; the local police officers who actually restrained the defendant for the greater portion of the time complained of, were also, by the express terms of the Act designated as local police authority and given important duties to perform; the arrest in question was avowedly made on account of the belief that the plaintiff was evading the provisions of the Act; and if such an assumption were true, it was not only within the power of the parties to restrain the plaintiff, but it was an express duty imposed on them under pain of a criminal prosecution for a default thereof. (Sec. 6.)

On the other hand, the plaintiff claims that neither the Selective Service Act nor the regulations govern or have anything to with the case, and that the matter is to be entirely determined from a consideration of the local law of California respecting arrests for crimes. This presents the essence of the controversy between the parties and, having solved this controversy we are able to determine the respective rights of the parties in this case.

In support of his contention, the plaintiff cites the Texas case of *Ex parte Jones,* 208 S. W. 525. We do not believe that the reasoning in *Ex parte Jones* is well based nor that the case supports the contention of plaintiff. The case arose upon an application for a writ of habeas corpus. It appeared that a sheriff was seeking to hold the applicant and did not

appear to be taking any steps to determine whether the holding was rightful up to the time of the issuance of the writ; he then filed a charge of vagrancy, which was held to be inconsequential as having been initiated after the issuance of the writ. In such a state of facts the discharge of the applicant on the writ would not seem to have been improper and we have no complaint as to the actual holding in the case.

But the court *arguendo* made use of the language quoted by counsel, to which we take exceptions. For example: It was stated that the court had examined the Selective Service Act and failed to find therein any authority given to the Chairman of the local "exemption" board to direct or authorize the arrest of one whom he may suspect of being guilty of an evasion of the terms of the Act, other than to proceed to make complaint before some officers or grand jury. It is quite apparent, from the language used, that the court had not examined the regulations in detail, for, as we have seen, under the express provisions of Section 130 of the regulations, the local board, receiving information of a delinquency, are required to direct the "police authority" to apprehend the delinquent; and from Section 284, setting forth Form 1012, it appears that this direction is not a "warrant" issued after a complaint filed with a magistrate, but is a direction to the local police authority "to locate such persons and bring them before the board." It may be further noted that

this written direction may be signed by a single member of the local board. These forms constitute a portion of the regulations, having the effect of law. It is to be further noted that when alleged delinquents are brought before the Board, under the aforesaid direction, there is first the inquiry to be made as to whether the delinquency was *wilfull,* and it is *only* in the *event* that the *board so finds,* that there is *to be any criminal prosecution whatever.* It thus appears that there is to be an arrest and a bringing before the board before a prosecution is initiated or even contemplated. In the practical administration of the Act, as we noted in our opening brief, by far the largest number of such cases were found to be not wilfull and criminal prosecutions were not initiated. So that the Texas court was erroneous in its declaration that a local board could not direct a draft evader to be seized until it had filed a complaint before a magistrate. It is to be further noted that Section 49 of the regulations authorized the local police authority to make such an arrest on their own initiative in a proper case, and that the arrest when so made had the same consequences, the party was to be brought before the draft board and a preliminary hearing had before there was to be even prosecution for crime. Manifestly, the local police authority could not have had a warrant when it was not contemplated that even a complaint had been filed. The opinion in the Texas case states that no brief had been filed on the part of the sheriff, hence it is not surprising that the

various features of the Selective Service Act did not come to the attention of the court.

But there is a still better reason why the holding in *Ex parte Jones* is not to be deemed the law governing this case, in that the Supreme Court of this State has held the contrary. In the recent case of

Michel v. Smith, 63 Cal. Dec. 230,

the Supreme Court of California had occasion to consider the same questions and has expressly declared that the pendency of the late war did effect the matter, that an arrest for evasion of the Act was not to be tested by the ordinary State law in respect of arrests, but was to be determined by the provisions of the Selective Service Act. In that case the arrest had been made of a person who was in fact guiltless but who was suspected by the local police officers with an evasion of the Act. The court said significantly:

> "The defendants were public officers. They had public duties to discharge. They were called to act in perilous, arduous and difficult times. They were invested with legal authority to act. The law of the country imposed upon them a public duty, for public purposes. They were punishable for neglect of duty, if they neglected to act in a case where there was sufficient or probable cause for action. The safety of the government, and the discipline of the army, depended upon their fidelity, and the country was materially interested in their conduct. It was the duty of the court, in such a case, un-

flinchingly to come up to the standard of duty, and pass upon the questions that had been committed to, and appropriately belonged to them. It would be a reproach to a court, under such circumstances, if through timidity or a desire to shirk responsibility, they should leave to the jury a question which, by the theory of our law, they are incompetent to try, whether probable cause for arrest had been shown. It is not only proper for the court, but by the wisdom of the sages of the law the courts are directed to give great latitude in the review of the acts of such officers. In the case of Wall v. McNamara, tried by Lord Mansfield, sitting at Westminster, in Michaelmas term, 1779, he said: 'In trying the legality of acts done by military officers in the exercise of their duty, great latitude ought to be allowed; and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright; it is the same as when complaints are brought against inferior civil magistrates, as justices of the peace, for acts done by them in the exercise of their civil duty. The principal inquiry to be made by a court of justice is, how the heart stood, and if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistakes.' See, also, the sensible remarks of Rosekrans, J., in Colion v. Beardsley (38 Barb. 29 and 45) and cases cited by him."

There the court held, in effect, that the matters coming to the attention of the officers were sufficient, as a matter of law, to constitute reasonable

grounds for the arrest; that the officers were not required to accept as true the statements of the party arrested but that they were enitled to detain him, having reasonable ground to believe that he was a deserter. It may be noted that in discussing the matter the court freely makes use of the term "probable cause" in reference to an action for damages for false imprisonment. The point is made by defendant in error here that "probable cause" is not an element in such an action. It may be true that the words are used in a different sense in discussing such actions from the sense in which the terms are employed in the case of actions for malicious prosecution. In the former class of actions the words properly apply to the case where there is said to be reasonable grounds for an arrest without warrant. Here an essential averment of the complaint was that there were no such reasonable grounds.

Having shown that it is contemplated and proper for an arrest to be made of a suspected draft evader, delinquent or deserter without warrant, such an arrest to be made upon reasonable grounds, or, in other words, upon "probable cause," the question remains as to whether there were reasonable grounds or probable cause under the circumstances for the detention of the plaintiff, it being established that in case there was such probable cause the officer need not wait for a warrant. And as to the existence of probable cause, we think the answer

must certainly be in the affirmative. Regard must be given to the grave peril of the time. It was not to be expected that much time could be given for preliminary investigation; the defendant had his official duty to perform and, as he testified, he remained each day until the day's work was done, sometimes very late; he could not have been expected to go upon any independent investigation, yet he was required under the peril of a criminal prosecution to act.

In such an event, he had the entire right to rely upon the truth of the statements made to him by the Bureau of Investigation of the Department of Justice. That Bureau was especially charged during the critical times in question with that very duty; a large appropriation had been made to that end and a very large staff of employees had been assigned to the investigation of such questions. The defendant could not leave his place of duty to make the investigation. He was justified in relying in the first instance upon the communications made to him by the very Bureau of the Government charged with the duty of making such investigation. There could not have been any source of information open to him of a higher apparent rank. We think it is quite clear that there was probable cause for the plaintiff's detention.

We invite the attention of the court particularly to the case last cited as being conclusive on the questions involved in the case at bar. While we

contend that the matter involves Federal law, yet the contention of the plaintiff is that it is governed by the ordinary law of the State of California, but the holding of the Supreme Court of this State is the best evidence that the law of the State of California does not govern the matter, but that the case is to be resolved from a consideration of the Selective Draft Act and regulations, and that the peril of the times is to be given controlling importance in determining the case.

Respectfully submitted,

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